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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-269

No. ~~1814~~

JOHN WILLIAM JOHNSTON, JR.
JOHN MIKE RUSSELL,
Petitioners,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, John William Johnston, Jr. and John Mike Russell, respectfully show:

OPINIONS BELOW

The opinion below was rendered by the Supreme Court of Georgia in *Johnston, et. al. v. The State*, No. 26330, and entered on March 4, 1971. A copy of said opinion is appended hereto as Appendix "A". A copy of the same opinion as it appeared when it was first entered on March 4, 1971 and before it was withdrawn in connection with a motion for rehearing and re-

written into the form as it appears in Appendix "A", is appended hereto as Appendix "B". These opinions have not been officially reported at the present time.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Georgia herein sought to be reviewed was rendered and entered on March 4, 1971. A copy of this judgment is appended hereto as Appendix "C".

A motion for rehearing was denied by the Supreme Court of Georgia on March 18, 1971, and a copy of that order is appended hereto as Appendix "D". Within ninety (90) days thereafter this petition was filed.

Jurisdiction of this Court to review the judgment in question is conferred by 28 U. S. C. Section 1257 (3) in that a right, privilege and immunity is specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

I.

Were the affidavits in support of the search warrants used as a basis for the search in these two cases sufficient to state probable cause for the issuance of the warrants even though they contain no data as to informer reliability, no underlying facts as to how the informer obtained his information and no data as to the *time* when the informer obtained his information.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section (1). All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II.

Title 27, Section 303 of the Georgia Code Annotated (1953 Revision) provides in relevant part as follows:

> "Upon the *written* complaint of any officer of the State or its political subdivisions charged with the duty of enforcing the criminal laws under oath or affirmation which states facts sufficient to show probable cause that a crime is being committed, or has been committed, ... any judicial officer authorized to hold a Court of inquiry . . . may issue a search warrant for the seizure of the following. . . ."

Title 27, Section 313 of the Georgia Code Annotated (1953 Revision) provides in relevant portion as follows:

> "The burden of proving that the search and seizure were lawful shall be on the State."

STATEMENT OF THE CASE

The Petitioners were indicted by the Bibb County Grand Jury for the offenses of possession of narcotic drugs and possession of depressant or stimulant drugs. (R-36-37, 39). Count Three of the Russell indictment was abandoned by the prosecution leaving two counts pending against each defendant. (R-93). Following the return of the charges by the Grand Jury, the Petitioners filed timely motions to suppress which are identical in substance. (R-48-24). A stipulation for a joint non-jury trial was entered into by the parties and approved

by the trial Judge. (R-25, 1). This stipulation also provided that the motions to suppress would be carried with the case and ruled upon at the conclusion of the evidence. Following the non-jury trial, the Court denied the motions to suppress in each case. (R-63-64, 139). The Court then adjudged both of the Petitioners guilty on each of the two counts, (R-65-66, 139), and pronounced a sentence of confinement in the State penitentiary for a period of seven years with the last five of said years suspended. (R-67-70, 140). Timely motions for new trial were filed and were overruled on November 16, 1970. (R-75-49, 50). A notice of appeal was filed on December 11, 1970, as provided by law, and both cases were transmitted for hearing to the Supreme Court of Georgia. On March 4, 1971, the Supreme Court of Georgia affirmed the judgment of the Superior Court of Bibb County, Georgia and entered the opinion appended hereto as Appendix "B". A timely motion for rehearing was filed by Petitioners and thereafter the opinion in Appendix "B" was withdrawn and rewritten and entered on March 18, 1971, as of March 4, 1971. (R-3-17). No copy of the opinion in its original form is found in the record. An exact copy of that original opinion as served on Petitioners is attached hereto as Appendix "B".

STATEMENT OF FACTS

The charges against Petitioners are based upon the fruits of a search of their motel rooms. The basis for the search was two search warrants, one for each of their rooms. (R-141-148). Both warrants contained separate statements of probable cause in the form of an

attached affidavit. (R-143, 147). The Johnston affidavit read as follows:

> "On August 26, 1969, an informer told officers that subject had in his room and automobile above described a large quantity of narcotic and dangerous drugs not obtained on prescription. Upon checking, officers determined that this informer was in a position to have seen these narcotic drugs as described by him. Officers also determined that this subject was in the office of Dr. Reese Eberhardt on Houston Avenue on August 25, 1969, and requested narcotic drugs of Dr. Eberhardt, but was refused. Officers also checked and determined that this subject does have a lodging at Room No. 219 at said Howard Johnson's Motor Lodge.
>
> Officers learned that Johnston was accompanied to Dr. Eberhardt's office by Mike Russell who was staying in Room No. 217 of the Howard Johnson's Motor Lodge, and that Mike Russell used the same name, age and address as that of subject.
>
> It was from the informer that officers learned of the visit to Dr. Eberhardt's office." (R-143).

The Russell affidavit is almost identical, except for the next to the last paragraph, and reads as follows:

"On August 26, 1969, an informer told officers that subject had in his room and automobile above described a large quantity of narcotic and dangerous drugs not obtained on prescription. Upon checking, officers determined that this informer was in a position to have seen these narcotic drugs as described by him. Officers also determined that this subject was in the office of Dr. Reese Eberhardt on Houston Avenue on August 25, 1969, and requested narcotic drugs of Dr. Eberhardt, but was refused. Officers also checked and determined that this subject does have a lodging at Room No. 217 at said Howard Johnson's Motor Lodge.

Officers also learned that while subject was in Dr. Eberhardt's office he used the name of John Johnston and the same age and address as John Johnston who was at the time staying in Room No. 219 of the said Howard Johnson's Motor Lodge and who accompanied him to Dr. Eberhardt's office.

It was from the informer that officers learned of the visit to Dr. Eberhardt's office." (R-147).

Both affidavits were made by Carl Barker, an investigator for the Bibb County Sheriff's Office. (R-94, 98). He went to the Superior Court Judge's home alone and procured both warrants. (R-102-103). Mr. Barker testified that some explanation was offered to the Judge along with the affidavits but did not say specifically what this was. (R-100). He further testified that *only*

the facts in the affidavits were sworn to before the issuing Judge. (R-100, 103).

While the affidavits above allege that the narcotics were in the Petitioners' cars *and* rooms, Mr. Barker testified that "the information was there (sic) would be in either one of the two places". (R-99).

Dr. Eberhardt had been contacted by the officers prior to issuance of the search warrants, (R-96, 98), but this contact does not appear in the affidavits which were presented to the issuing judge. (R-143, 147). The affidavits also allege that Petitioners requested "narcotic drugs" from Dr. Eberhardt but the testimony of Mr. Barker shows that the officers never knew what was requested from Dr. Eberhardt except "real strong pain pills". (R-97-98, 108). It was clear that no narcotics were obtained. (R-97).

Many of the details related in Court by Officer Barker were not placed in the search warrants (R-107), and, with some small exception, the matters placed in the affidavits came solely from the informer. (R-107-108). All the information relating to actual criminal conduct came directly from the informer. (R-107-108). In this regard, it was admitted that the informer was anonymous and was not what is ordinarily referred to as "a reliable informer" since Mr. Barker "didn't know a thing about him". (R-102-103-104).

The affidavits to the search warrants do not allege that the informer had *personally* observed the narcotics at the places related to the officers. (R-104-105). The

statement in the affidavits that "Upon checking officers determined that this informer was in a position to have seen these narcotic drugs as described by him" was the only reference to personal knowledge and was admittedly only a conclusion. (R-105).

Officer Barker's testimony was the same as to the affidavits in support of both warrants. (R-107).

The affidavits did not show a time when the informer supposedly saw the narcotics and he did not give that information to the officers. (R-105).

The search warrants were the sole legal basis offered at the trial for the search and seizure.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

The federal questions sought to be reviewed in this case turn on the legality *vel non* of a search and seizure pursuant to two search warrants.

The legality and validity of the search warrants was questioned by Petitioners in the Trial Court by timely motions to suppress specifically alleging that the search warrants in question were issued upon the basis of factual allegations insufficient, as a matter of law, to establish probable cause within the meaning of the Fourth and Fourteenth Amendments to the Constitution of the United States. (R-15-25).

Both motions to suppress were carried with the case pursuant to stipulation (R-58) and denied by the Trial Court at the close of the evidence. (R-63-64).

Petitioners enumerated as error the denial of their motions to suppress (R-2) and again urged the same grounds to the Georgia Supreme Court in a motion for rehearing. (R-22-28). The Georgia Supreme Court specifically ruled upon and determined the federal question of probable cause adverse to the Petitioners. (R-3-14). Specifically, the Court held that "the facts as stated in the affidavits of the search warrants, taken as true, constitute a sufficient showing of probable cause". (R-3).

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT

I.

The Decision Of The Supreme Court Of Georgia Upholding The Validity Of The Search Warrants In Question Is Based Upon An Erroneous Construction And Application Of Applicable Decisions Of This Court

Two decisions of this Court lay down certain basic requirements for the issuance of search warrants based upon information supplied by an informer. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). These decisions require a valid affidavit in support of a search warrant to reveal: (1) facts as to how and why the informant reached his conclusion and (2) the factual basis upon which the affiant concluded that the informer was credible or his information reliable. It is clear that the importance of complying with the first of these requirements lies in

the fact that it eliminates the possibility that the informant's information was merely hearsay derived from a source whose reliability was not shown. This seems to be the consistent federal interpretation of these cases. See, *e. g., Von Utter v. Tulloch,* 426 F. 2d 1 (1st Cir. 1970), Cert. den., 400 U. S. 826.

The opinion below has substantially ignored the requirements of *Aguilar* and *Spinelli* and approved affidavits based upon information received from an informer of admitted unknown reliability (R-102-103-104) and revealing no factual basis to show personal knowledge of the information he gave. The Georgia Supreme Court's recital that the informant's *exact* words need not be used (R-4) approved the use of conclusions in the affidavits so as to defeat the reason for the holding of *Aguilar* and *Spinelli,* namely, to avoid the use of informant information based upon hearsay. Furthermore, the Court's inference of personal knowledge (R-6) is constitutionally impermissible and contrary to this Court's decision in *Giordenello v. United States,* 357 U. S. 480, 486 (1958).

The opinion below has in effect adopted the "totality of circumstances" approach rejected by *Spinelli.* The opinion should be read however, as basing the finding of probable cause only upon the facts set out in the affidavits since headnote No. 1(a) of the decision so indicates and Georgia Code Annotated, Section 27-303 (1953 Revision) so requires. See, *Campbell v. The State,* 226 Ga. 883, 885 (1970). Language in the opinion discussing other matters outside the affidavits is irrelevant since a finding of probable cause in the affidavits is

required and any further constitutional justification for issuance of the warrants would be unnecessary and of no constitutional importance. Cf. *Whiteley v. Warden*, ____ U.S. ____ 28 L. Ed. 2d 306 (1971).

The opinion below is further contrary to *Spinelli* in that corroboration was relied upon (R-5-6) to make out *both* of the *Aguilar-Spinelli* requirements. *Spinelli* rejects this approach. 393 U.S. at 417; see also, *Whiteley v. Warden*, ____ U.S. ____ 28 L. Ed. 2d 306 (1971).

An examination of the affidavits in this case reveals that no *time* is specified as to when the informer saw what he saw or heard what he heard. The opinion below permits an inference to suffice for the Constitutional showing required by this Court's decision in *Sgro v. U. S.*, 287 U.S. 208 (1932). *Sgro* clearly states that the determination of time "cannot be left to mere inference or conjecture". 287 U.S. at 211.

In summary, the opinion below upheld search warrants based upon affidavits containing (1) no data as to informer reliability, (2) no underlying facts as to how the informer obtained his information and (3) no data as to the time when the informer obtained his information. Such a ruling is clearly contrary to this Court's applicable decisions set out above.

CONCLUSION

Accordingly, this petition for writ of certiorari should be granted and the judgment of the Supreme Court of Georgia should be reversed and the sentence imposed upon Petitioners should be vacated and set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing petition for writ of certiorari upon Mr. Whitney T. Evans, Counsel of Record for the Respondent by depositing three (3) copies of same in the United States Mail with First Class Postage prepaid and addressed to said Counsel of Record at his Post Office Address at the Bibb County Courthouse, Macon, Georgia.

This ____ day of June, 1971.

Floyd M. Buford
Counsel of Record

APPENDIX "A"

26330 — Rewritten on Rehearing

607

Supreme Court of Georgia Decided: March 4, 1971

26330. JOHNSTON et al. v. THE STATE.

1. (a) The facts as stated in the affidavits of the search warrants, taken as true, constitute a sufficient showing of probable cause.

   (b) The sworn evidence before the judicial officer justified the issuance of the search warrants.

2. *Ga. Code Ann.* § 79A-903(b,3) is not subject to the constitutional attack made thereon on the ground that it is an unlawful delegation of legislative power.

3. The enumerated error of the overruling of the motion for a new trial is not argued, hence is deemed abandoned.

4. The court did not err in its judgment for any reason urged.

The defendants were arrested on August 26, 1969, in a motel room in Bibb County, rented by one of them. The arrest resulted from a search of the premises executed under a search warrant of the same date. The search revealed quantities of LSD and "marijuana" (as spelled in *Ga. Code Ann.*, § 79A-903(b,5), Ga. L. 1967,

THE MOTION FOR A REHEARING WAS DENIED TODAY March 18, 1971

pp. 296, 344, as amended, Ga. L. 1970, pp. 470, 471; or "marihuana," as spelled in *Code Ann.* § 79A-802(13), Ga. L. 1967, pp. 296, 325, as amended, Ga. L. 1970, p. 470) and the defendants were charged with possession of narcotic drugs and possession of depressant or stimulant drugs.

The defendants filed demurrers to the indictments and moved to suppress evidence obtained as a result of the search on the grounds that the warrants were invalid due to their insufficiency to establish probable cause and that the search exceeded the scope authorized by the warrants.

After hearing on the issues presented, the trial judge overruled the demurrers to the indictments and the motions to suppress. The joint nonjury trial of both defendants resulted in their convictions on two counts, hereinabove stated, from which judgment they appeal. Enumerated as error are the overruling of the defendants' motion for a new trial, their second and third demurrers to count 2 of their indictments and their motion to suppress evidence.

FELTON, Justice. 1. The affidavit submitted to the judicial officer as the basis for issuing the search warrant in the case of defendant Johnston reads as follows: "On August 26, 1969, an informer told officers that subject had in his room and automobile above described a large quantity of narcotic and dangerous drugs not obtained on prescription. Upon checking, officers determined that this informer was in a position to have seen these narcotic drugs as described by him. Officers also determined that this subject was in

the office of Dr. Reese Eberhardt on Houston Avenue on August 25, 1969, and requested narcotic drugs of Dr. Eberhardt, but was refused. Officers also checked and determined that this subject does have a lodging at Room No. 219 at said Howard Johnson's Motor Lodge.

"Officers learned that Johnson was accompanied to Dr. Eberhardt's office by Mike Russell who was staying in Room 217 of the Howard Johnson's Motor Lodge, and that Mike Russell used the same name, age and address as that of subject.

"It was from the informer that officers learned of the visit to Dr. Eberhardt's office."

The affidavit in defendant Russell's case is identical, with the exceptions that his room number is specified as No. 217 and the penultimate paragraph reads as follows: "Officers also learned that while subject was in Dr. Eberhardt's office he used the name of John Johnston and the same age and address as John Johnston who was at the time staying in Room 219 of the said Howard Johnson's Motor Lodge and who accompanied him to Dr. Eberhardt's office."

(a) Appellants object that the above affidavits contain no data as to informer reliability. ". . . [W]here the officer relies upon an informant he must give sufficient information of the underlying circumstances from which he concluded that the informant was reliable. . . . [cases cited] In his affidavit should appear a recital of what the informant actually said, and why

the officer thought that the information was credible (*Peters v. State,* 114 Ga. App. 595 (152 SE2d 647)), especially when the name of the informant is not stated." Burns v. State, 119 Ga. App. 678, 683 (168 SE2d 786) and cit. We do not construe the holdings, requiring a recital of what the informant *actually* said, as to require that the informant's *exact* words be quoted. The case of Beck v. Ohio, 379 U.S. 89, 97 (85 SC 223, 13 LE2d 142), cited and quoted from in Peters v. State, supra, p. 597, held merely that "... when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show *with considerably more specificity than was shown in this case* what the informer actually said...." (Emphasis supplied.) As long as the substance of his statement is fairly stated there is compliance with this requirement. The statement, that the informant told officers "that subject had in his room and automobile above described a large quantity of narcotic and dangerous drugs not obtained on prescription," was sufficient for this purpose. As far as the informant's reliability, this was shown by the alleged "underlying circumstances" of the officers' verification of the informant's information as to the defendants' places of lodging, vehicles description and activities, as well as their determination that the informant had been "in a position to have seen these narcotic drugs as described by him." ". . . [I]nsufficiency of the affidavit does not appear from the fact alone that *some or all* of the facts recited come from information furnished by others (Strauss v. Stynchcombe, 224 Ga. 859(2) (165 SE2d 302)), if there is substantial basis for crediting the hearsay.... [cases cited]" Burns v. State, supra, p. 683.

As to the contention that the affidavits contain no underlying facts as to how the informant obtained his information, the only reasonable inference from the statements, that the informant had stated that the defendants had the illicit drugs and that it had been determined that he had been in a position to have seen them, is that he had personally observed the things about which he told the police officers. Such an inference as to informant reliability can be made when the magistrate is confronted with such detail, Spinelli v. U. S., 393 U.S. 410, 417 (89 SC 584, 21 LE2d 637), and is not inconsistent with the fact that the State has the burden of proving that the search and seizure were lawful. *Ga. Code Ann.* § 27-313(b) (Ga. L. 1966, pp. 567, 571).

It is also contended that the affidavits lack data as to the time when the informant obtained his information. "A 'prime element in the concept of probable cause is the time of the occurrence of the facts relied upon.' Fowler v. State, 121 Ga. App. 22, 23 (172 SE2d 447)." Windsor v. State, 122 Ga. App. 767, 786 (178 SE2d 751). The Court of Appeals in the *Fowler* case stated further on p. 23, however, that " . . . it was not necessary that the precise date of the occurrence be given but it should appear from the facts that the occurrence should be so near in point of time to the making of the affidavit and the execution of the search warrant as to create a reasonable belief that the same conditions described in the affidavit still prevailed at the time of the issuance of the warrant." In determining the probability that the defendants still possessed the illicit drugs when the warrant was issued, the judicial

officer could consider the facts, which appear from the affiant's sworn statements and affidavits, that the defendants were out-of-state transients, temporarily staying in a motel, and that on the day before they had unsuccessfully attempted to obtain a narcotic drug from a local physician by fraud, deceit, misrepresentation, subterfuge, forgery, alteration, concealment of a material fact, use of a false name, or the giving of a false address, or a combination of the above, in violation of *Ga. Code Ann.* § 79A-819 (Ga. L. 1967, pp. 296, 342), which is a misdemeanor. *Code Ann.* § 79A-9910 (Ga. L. 1967, pp. 296, 374; Ga. L. 1970, p. 461). While the *Spinelli* case, supra, p. 415 rejected the "totality of circumstances" approach in cases where the informant's tip is a necessary element in the finding of probable cause, the court reaffirmed its previous holding, "that the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit. United States v. Ventresca, 380 U.S. 102, 108 (1965)." Furthermore, in this case reliance was not placed solely upon the informant's tip, but his information was corroborated and amplified by independent investigation.

On page 419, *Spinelli* stated as follows: "In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly

limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257, 270-271 (1960)."

The facts as stated in the affidavits, taken as true, constitute a sufficient showing of probable cause. See Campbell v. State, 226 Ga. 883, 885 (178 SE2d 257).

(b) We must now decide the question of whether or not the sworn evidence before the judicial officer, considered in its totality, justified the issuance of the search warrant. Campbell v. State, supra, p. 886(1,b).

The affiant testified, at page 8 of the transcript of evidence, that he gave the following sworn oral testimony to the judicial officer: That the informant told the affiant that he had personally observed the narcotics; that the officers had checked different places and with different people to verify the truth of the informant's statements; that the officers determined from the motel register that the defendants had checked into the motel some three days prior to the search; that the informant knew the automobiles and the correct numbers of the rooms the defendants had rented; that the officers had personally conversed with Dr. Eberhardt and learned from him that the defendants were examined by Dr. Eberhardt, who was suspicious because of faked symptoms on the part of one of them, their request for strong pain killing drugs, and because both of them gave the same name; that affiant had given the informant's name to the judicial officer; and that

the informant had in fact described the narcotics. The fact that the informant told the affiant that the drugs were either in the cars or the rooms, does not show that the information was not timely or reliable, since the drugs could have been, and apparently were, so easily and quickly transferred from one location to the other. The above was a sufficient showing of probable cause to justify the issuance of search warrants.

2. Appellants attack the constitutionality of *Code Ann.* § 79A-903 (b,3) (Ga. L. 1967, pp. 296, 344; Ga. L. 1970, pp. 470, 471), which forms the basis of count two of both indictments and which provides as follows: "(b) The term 'depressant or stimulant drug' means: . . . 3. Any drug which contains any quantity of a substance designated by *present* regulations promulgated under the *Federal Act* as having potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect." (Emphases supplied.) It is contended that this statute, construed in pari materia with Code Ann. § 79A-102(g) (Ga. L. 1967, pp. 296, 299), which defines "Federal Act" so as to include all amendments to and all regulations promulgated by the Commissioner of the Federal Food and Drug Administration under the Federal Food, Drug and Cosmetic Act of the United States of America, is an invalid delegation of legislative power to Congress in that it undertakes to make future Federal legislation a part of the law of this State upon that subject. See Featherstone v. Norman, 170 Ga. 370, 393(4) (153 SE 58). Regardless of whether or not § 79A-102(g), supra, may have the contended

effect upon any other sections in this Title, it does not have such effect upon § 79A-903(b,3) for the reason that the express language therein limits the regulations which are to be applicable to "*present* regulations," which means those existing at the time of the enactment of § 79A-903(b,3). "When a statute adopts a part or all of another statute, domestic or foreign, general or local, by specific and descriptive reference thereto, the adoption takes the statute as it exists at that time. The subsequent amendment or repeal of the adopted statute or any part thereof has no effect upon the adopting statute. . . ." Featherstone v. Norman, supra, p. 394. Had the General Assembly used "regulations" with no adjective, or used a term such as "regulations to be promulgated, etc." or "subsequently enacted regulations," etc., appellants' contention might have merit. It follows that the statute under attack is not an unconstitutional delegation of legislative power by the General Assembly.

Furthermore, the amendment to the Federal Act which expressly included the drug LSD as a "depressant or stimulant drug," was enacted in 1966, hence was a part of the Federal Act at the time of its adoption by the Georgia General Assembly in 1967.

3. The enumerated error of the overruling of the motion for a new trial is not argued, hence is deemed abandoned.

4. The court did not err in its judgment for any reason urged.

Judgment affirmed. All the Justices concur.

APPENDIX "B"

607

Supreme Court of Georgia Decided: Mar. 4, 1971

26330. JOHNSTON v. THE STATE.

1. (a) The facts as stated in the affidavits of the search warrants, taken as true, constitute a sufficient showing of probable cause.

   (b) The sworn evidence before the judicial officer justified the issuance of the search warrants.

2. *Ga. Code Ann.* § 79A-903(b,3) is not subject to the constitutional attack made thereon on the ground that it is an unlawful delegation of legislative power.

3. The enumerated error of the overruling of the motion for a new trial is not argued, hence is deemed abandoned.

4. The court did not err in its judgment for any reason urged.

The defendants were arrested on August 26, 1969, in a motel room in Bibb County, rented by one of them. The arrest resulted from a search of the premises executed under a search warrant of the same date. The search revealed quantities of LSD and "marijuana" (as spelled in *Ga. Code Ann.*, §79A-903 (b,5), Ga. L. 1967, pp. 296, 344, as amended, Ga. L. 1970, pp. 470, 471; or

"marihuana," as spelled in *Code Ann.* § 79A-802(13), Ga. L. 1967, pp. 296, 325, as amended, Ga. L. 1970, p. 470) and the defendants were charged with possession of narcotic drugs and possession of depressant or stimulant drugs.

The defendants filed demurrers to the indictments and moved to suppress evidence obtained as a result of the search on the grounds that the warrants were invalid due to their insufficiency to establish probable cause and that the search exceeded the scope authorized by the warrants.

After hearing on the issues presented, the trial judge overruled the demurrers to the indictments and the motions to suppress. The joint nonjury trial of both defendants resulted in their convictions on two counts, hereinabove stated, from which judgment they appeal. Enumerated as error are the overruling of the defendants' motion for a new trial, their second and third demurrers to count 2 of their indictments and their motion to suppress evidence.

FELTON, Justice. 1. The affidavit submitted to the judicial officer as the basis for issuing the search warrant in the case of defendant Johnston reads as follows: "On August 26, 1969, an informer told officers that subject had in his room and automobile above described a large quantity of narcotic and dangerous drugs not obtained on prescription. Upon checking, officers determined that this informer was in a position to have seen these narcotic drugs as described by him. Officers also determined that this subject was in the office of Dr. Reese Eberhardt on Houston Avenue on

August 25, 1969 and requested narcotic drugs of Dr. Eberhardt, but was refused. Officers also checked and determined that this subject does have a lodging at Room No. 219 at said Howard Johnson's Motor Lodge.

"Officers learned that Johnston was accompanied to Dr. Eberhardt's office by Mike Russell who was staying in Room 217 of the Howard Johnson's Motor Lodge, and that Mike Russell used the same name, age and address at that of subject.

"It was from the informer that officers learned of the visit to Dr. Eberhardt's office."

The affidavit in defendant Russell's case is identical, with the exceptions that his room number is specified as No. 217 and the penultimate paragraph reads as follows: "Officers also learned that while subject was in Dr. Eberhardt's office he used the name of John Johnston and the same age and address as John Johnston who was at the time staying in Room 219 of the said Howard Johnson's Motor Lodge and who accompanied him to Dr. Eberhardt's office."

(a) Appellants object that the above affidavits contain no data as to informer reliability. "... [W]here the officer relies upon an informant he must give sufficient information of the underlying circumstances from which he concluded that the informant was reliable.... [cases cited] In his affidavit should appear a recital of what the informant actually said, and why the officer thought that the information was credible ..., especially when the same of the informant is not

stated." Burns v. State, 119 Ga. App. 678, 683 (168 SE2d 786) and cit. We do not construe the holdings, requiring a recital of what the informant *actually* said, as to require that the informant's *exact* words be quoted. As long as the substance of his statement is fairly stated there is compliance with this requirement. The statement, that the informant told officers "that subject had in his room and automobile above described a large quantity of narcotic and dangerous drugs not obtained on prescription," was sufficient for this purpose. As far as the informant's reliability, this was shown by the alleged "underlying circumstances" of the officers' verification of the informant's information as to the defendants' places of lodging, vehicles description and activities, as well as their determination that the informant had been "in a position to have seen these narcotic drugs as described by him," ". . . [I]nsufficiency of the affidavit does not appear from the fact alone that *some or all* of the facts recited come from information furnished by others (Strauss v. Stynchcombe, 224 Ga. 859(2) (165 SE2d 302)), if there is substantial basis for crediting the hearsay .... [cases cited]" Burns v. State, supra, p. 683.

As to the contention that the affidavits contain no underlying facts as to how the informant obtained his information, the only reasonable inference from the statements, that the informant had stated that the defendants had the illicit drugs and that it had been determined that he had been in a position to have seen them, is that he had personally observed the things about which he told the police officers.

It is also contended that the affidavits lack data as to the time when the informant obtained his information. "A 'prime element in the concept of probable cause is the time of the occurrence of the facts relied upon.' Fowler v. State, 121 Ga. App. 22, 23 (172 SE2d 447)." Windsor v. State, 122 Ga. App. 767, 768 (178 SE2d 751). The Court of Appeals in the *Fowler* case stated further on p. 23, however, that ". . . it was not necessary that the precise date of the occurrence be given but it should appear from the facts that the occurrence should be so near in point of time to the making of the affidavit and the execution of the search warrant as to create a reasonable belief that the same conditions described in the affidavit still prevailed at the time of the issuance of the warrant." In determining the probability that the defendants still possessed the illicit drugs when the warrant was issued, the judicial officer could consider the facts, which appear from the affiant's sworn statements and affidavits, that the defendants were out-of-state transients, temporarily staying in a motel, and that on the day before they had unsuccessfully attempted to obtain a narcotic drug from a local physician by fraud, deceit, misrepresentation, subterfuge, forgery, alteration, concealment of a material fact, use of a false name, or the giving of a false address, or a combination of the above, in violation of *Ga. Code Ann.* § 79A-819 (Ga. L. 1967, pp. 296, 342), which is a misdemeanor. *Code Ann.* §79A-9910 (Ga. L. 1967, pp. 296, 374; Ga. L. 1970, p. 461).

The facts as stated in the affidavits, taken as true, constitute a sufficient showing of probable cause. See Campbell v. State, 226 Ga. 883, 885 (178 SE2d 257).

(b) We must now decide the question of whether or not the sworn evidence before the judicial officer, considered in its totality, justified the issuance of the search warrant. Campbell v. State, supra, p. 886(1,b).

The affiant testified that he gave the following sworn oral testimony to the judicial officer: That the informant told the affiant that he had personally observed the narcotics; that the officers had checked different places and with different people to verify the truth of the informant's statements; that the officers determined from the motel register that the defendants had checked into the motel some three days prior to the search; that the informant knew the automobiles and the correct numbers of the rooms the defendants had rented; that the officers had personally conversed with Dr. Eberhardt and learned from him that the defendants were examined by Dr. Eberhardt, who was suspicious because of faked symptoms on the part of one of them, their request for strong pain killing drugs, and because both of them gave the same name; that affiant had given the informant's name to the judicial officer; and that the informant had in fact described the narcotics. The above was a sufficient showing of probable cause to justify the issuance of search warrants.

2. Appellants attack the constitutionality of *Code Ann.* § 79A-903 (b,3) (Ga. L. 1967, pp. 296, 344; Ga. L. 1970, pp. 470, 471), which forms the basis of count two of both indictments and which provides as follows: "(b) The term 'depressant or stimulant drug' means: . . . 3. Any drug which contains any quantity of a substance designated by *present* regulations promulgated

under the *Federal Act* as having potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect." (Emphases supplied.) It is contended that this statute, construed in pari materia with *Code Ann.* § 79A-102(g) (Ga. L. 1967, pp. 296, 299), which defines "Federal Act" so as to include all amendments to and all regulations promulgated by the Commissioner of the Federal Food and Drug Administration under the Federal Food, Drug and Cosmetic Act of the United States of America, is an invalid delegation of legislative power to Congress in that it undertakes to make future Federal legislation a part of the law of this State upon that subject. See Featherstone v. Norman, 170 Ga. 379, 393(4) (153 SE 58). Regardless of whether or not § 79A-102(g), supra, may have the contended effect upon any other sections in this Title, it does not have such effect upon § 79A-903 (b,3) for the reason that the express language therein limits the regulations which are to be applicable to "*present* regulations," which means those existing at the time of the enactment of §79A-903(b,3). "When a statute adopts a part or all of another statute, domestic or foreign, general or local, by specific and descriptive reference thereto, the adoption takes the statute as it exists at that time. The subsequent amendment or repeal of the adopted statute or any part thereof has no effect upon the adopting statute. . . ." Featherstone v. Norman, supra, p. 394. Had the General Assembly used "regulations" with no adjective, or used a term such as "regulations to be promulgated, etc." or "subsequently enacted regulations," etc., appellants' contention might have merit. It follows that the statute under attack is not an unconstitutional delegation of legislative power by the General Assembly.

Furthermore, the amendment to the Federal Act which expressly included the drug LSD as a "depressant or stimulant drug," was enacted in 1966, hence was a part of the Federal Act at the time of its adoption by the Georgia General Assembly in 1967.

3. The enumerated error of the overruling of the motion for a new trial is not argued, hence is deemed abandoned.

4. The court did not err in its judgment for any reason urged.

Judgment affirmed. All the Justices concur.

APPENDIX "C"

SUPREME COURT OF GEORGIA

Atlanta, March 4, 1971

The Honorable Supreme Court met pursuant to adjournment. The following was rendered: John William Johnston, Jr., et al., v. The State.

This case came before this court upon an appeal from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $30.00

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta, March 19, 1971

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Adams, O'Neal & Hemingway paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

(Signed) JOLINE B. WILLIAMS, Clerk

Supreme Court of Georgia Decided: March 4, 1971

26330. JOHNSTON et al. v. THE STATE.

1. (a) The facts as stated in the affidavits of the search warrants, taken as true, constitute a sufficient showing of probable cause.

   (b) The sworn evidence before the judicial officer justified the issuance of the search warrants.

2. *Ga. Code Ann.* §79A-903(b,3) is not subject to the constitutional attack made thereon on the ground that it is an unlawful delegation of legislative power.

3. The enumerated error of the overruling of the motion for a new trial is not argued, hence is deemed abandoned.

4. The court did not err in its judgment for any reason urged.

APPENDIX "D"

SUPREME COURT OF GEORGIA

Atlanta, March 18, 1971

The Honorable Supreme Court met pursuant to adjournment. The following order was passed: John William Johnston, Jr., et al., v. The State.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta, March 19, 1971

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

(Signed) JOLINE B. WILLIAMS, Clerk.

70 - 269

Supreme Court, U.S.
FILED
JUL 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted]

JOHN WILLIAM JOHNSTON, JR.,
JOHN MIKE RUSSELL,

Petitioners,

versus

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970

No. 1814

JOHN WILLIAM JOHNSTON, JR.,
JOHN MIKE RUSSELL,
Petitioners,

versus

THE STATE OF GEORGIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent, State of Georgia, respectfully shows:

STATEMENT OF THE CASE

Respondent adopts petitioners' statement of facts as correct, with the following exceptions and additions:

Carl Barker testified that he did "fully explain" to the magistrate the details of his investigation to de-

termine the reliability of the informer and to reveal facts as to how the informer reached his conclusions. (R-100). Some of the details were: (1) that the informer told Officer Barker that he had personally observed the narcotics (R-95, 104); (2) that the officers had checked different places and with different people to verify the truth of the informer's statements (R-94, 108); (3) that the officers determined from the motel register that the petitioners had checked into the motel some three days prior to the search (R-95); (4) that the informer knew the cars and the correct numbers of the rooms petitioners had rented (R-99, 106); (5) that the officers had personally conversed with Dr. Eberhardt and learned from him that the petitioners were examined by Dr. Eberhardt who was suspicious because of faked symptoms on the part of one of them, their request for strong pain-killing drugs, and because both of them gave the same name (R-95, 96, 97); (6) that Officer Barker had given the informer's name to the magistrate (R-103); and (7) that the informer had in fact described the narcotics. (R-104). Officer Barker also testified that he was in the magistrate's home close to one-half of an hour. (R-102).

Georgia Code Section 79A-819(1) (Georgia Laws 1967, page 296 et seq.) provides as follows: "no person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug: — by the use of a false name or the giving of a false address." Georgia Code Section 79A-708 provides as follows: "no person shall obtain or attempt to obtain any dangerous drug by use of a fictitious name or by the giving of a false address." Georgia Code Section 79A-802(14) provides that "'narcotic

drugs' means — opium —." Georgia Code Section 79A-802(12) defines opium as "morphine, codeine, and heroin — ." Georgia Code Section 79A-702 defines a dangerous drug as "anything which — may be dispensed only upon prescription." We urge the Court to take judicial notice that morphine, codeine and heroin are strong pain relievers, and we submit that officer Barker's interpretation of "real strong pain pills" as narcotics was well within the definition set forth in 79A-802. Obviously, these type drugs require a prescription. The affidavit thus shows that crimes were being committed in Dr. Eberhardt's office, and this information did not come from the informer (R-95, 96, 97).

Officer Barker *did not* agree that the informer's personal observation was not set forth in the affidavit. The conclusion referred to on page 9 of petitioners' brief obviously refers to the conclusion that the informer could have seen *what he said he saw* (R-105). The investigation to determine whether the informer did in fact see the narcotics as described by him could center only on accessibility, etc. and could only result in a conclusion from the facts gathered. In any event, Officer Barker is not the one to decide whether personal observation is noted in the affidavits.

Whether Officer Barker was sworn to all the facts recited to the magistrate is not clear, but the trial court could have found from the testimony that all the conversation was under oath (R-100, 103).

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT

The affidavit does state with sufficient clarity to put the magistrate on notice of how the informer obtained his information, and that the information is reliable.

The affidavit states "Officers also *determined* that this informer was in a position to have seen these narcotic drugs *as described by him.*" (Emphasis ours.) Thus personal knowledge on the part of the informer is before the magistrate. The informer had described how he had seen the drugs. We submit that there is no other logical or common-sense construction of the sentence. It is not a question of inferring personal knowledge. The sentence fulfills the two vital requirements of *Aguilar vs Texas*, 378 U.S. 108 (1964) and *Spinelli vs United States*, 393 U.S. 410 (1969). It explains the "underlying circumstances" of the informer's tip, and it establishes to some degree the informer's reliability. That the informer was in a position to have seen the narcotics bears on the informer's reliability and not the underlying circumstances. Webster defines "determine" as "to find out exactly; ascertain". Thus the magistrate knew that these officers based the reliability on facts discovered during investigation.

Respondent submits that it is readily apparent to any reader of this affidavit that the informer had personal knowledge of the existence of the narcotics. In addition to reading it in the affidavit he was informed by Officer Barker (R-95, 100, 104).

In *Ventresca v. U.S.*, 380 U.S. 102 (1965), the Court held that the appellate court should not overturn the exercise of discretion by the issuing magistrate by a hypertechnical construction. As stated in *Draper v. U.S.*, 358 U.S. 307 (1959) the Court is dealing with probabilities, factual and practical considerations of everyday life, on which reasonable and prudent men, not legal technicians, act. The magistrate could tell from the affidavit in this case that the tip was not based on casual rumor and that it was not an accusation based merely on an individual's reputation. As stated in *Spinelli*, supra, he "could reasonably infer that the informant had gained his information in a reliable way."

Here, there was an independent investigation to corroborate the informer, and the investigative efforts in this case are set forth in the affidavit. Officer Barker made sure the petitioners did have lodging in Rooms 217 and 219 as described by the informer, and that they were driving certain automobiles as described by the informer. Barker also determined that the petitioners did visit Dr. Eberhardt's office as the informer said they did, and learned additionally that Mike Russell had used a false name and address for the apparent purpose of obtaining real strong pain pills, known generally to be some form of narcotic. We submit that it is not important that petitioners did not obtain the drugs; they could have gotten them later the same day at some other place. What is important is that they were attempting to obtain some form of narcotic and their manner in so doing was criminal. The probability that these type people would have narcotics is greatly enhanced, and the informer's tip cor-

roborated to a great extent. Officer Barker then proceeded to check out the very heart of the informer's tip — that he had seen the narcotics. After an investigation involving other places and people the officers determined that the "informer easily could have been in a position" to see the items and that "the statements he gave us was checked out with the facts and found to be true." (R-94, 95, 100). Petitioners are critical that the investigative process is not further described in the affidavit. It is apparent that a further disclosure in this case would work an injustice. The State has the privilege to withhold from disclosure the identity of persons who furnish information to police officers concerning the commission of crimes. Although the privilege is not absolute on the issue of guilt or innocence, it does appear to be so on Fourth Amendment issues. In *McCray v. Illinois,* 386 U.S. 300 (1967) this Court seemingly recognizes the need in some cases to keep the informer's identity secret. There are apparently no decisions reflecting this Court's insistence on an application of the *Aguilar* and *Spinelli* tests regarding a detailed description of underlying circumstances when such description, in itself, identifies the informer.

Although the affidavit does not recite that the officers conversed with Dr. Eberhardt himself, it is clear that this was first-hand information obtained from police investigation. We again call the Court's attention to Webster's definition of the word "determine." There was a substantial basis for crediting this hearsay. Thus, the magistrate was aware from a reading of the affidavit itself that petitioners were in the doctor's office and had conducted themselves in a clandestine

and criminal manner. The officers would not have known of the visit itself had the informer not told them, and this would indicate to the magistrate the reliability of the informer — that he knew what he was talking about. Accordingly, respondent submits that there is here that "further support" that "would permit the suspicions engendered by the informant's reports to ripen into a judgment that a crime was probably being committed." *Spinelli,* supra.

Assuming that the informer's tip alone would not establish probable cause (even though the informer had seen the narcotics and had already been corroborated to a great extent), the unexpected and additional information gathered by the officers in Dr. Eberhardt's office while acting pursuant to that tip, would sustain the affidavit. *Whiteley vs Warden,* — U.S. — 28 L.Ed. 2d 306 (1971). Petitioners' conduct in the doctor's office is corroborative of the informer's tip that they were unlawfully possessing drugs. The *Whiteley* case does not hold that all facts constituting probable cause be set forth in the affidavit, but merely disclosed to the issuing magistrate.

The case of *Giordenello v. United States,* 357 U.S. 480, 486, (1958) cited by petitioners involves an arrest affidavit which states no facts at all, and has no bearing on these issues.

On the issue of whether the informer's tip was fresh or stale, we made the same argument before the Supreme Court of Georgia as is adopted in that Court's opinion. A common-sense reading of these affidavits makes it abundantly clear that petitioners probably

had illegal drugs in their motel rooms at the time of the issuance of the affidavits. In *Sgro vs United States*, 287 U.S. 206 (1932) referred to in petitioners' brief the United States Commissioner who issued the warrant took no proof to show that probable cause then existed and he made no finding of probable cause at the time. The wording of that opinion was tailored to those facts. There, the magistrate had no facts before him; here, there were numerous dates and facts all happening within a day or two of the issuance of the warrant, to enable the magistrate to make an independent and intelligent determination that the information was current.

CONCLUSION

Respondent respectfully urges that the petition for a Writ of Certiorari be denied as failing to warrant review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of July, 1971.